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No. 94-770

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

CLETUS R. ANDERSON,
Petitioner,

v.

BARRY J. NIDORF, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the First Amendment is violated by state legislation requiring disclosure of the name and address of the manufacturer, as well as the name of the artist, on the box or jacket of recordings or audio visual works which, for commercial advantage or private financial gain, are sold or possessed for sale.

Whether overbreadth principles are violated by state legislation requiring disclosure of the name and address of the manufacturer, as well as the name and address of the artist, on the box or jacket of recordings or audio visual works which, for commercial advantage or private financial gain, are sold or possessed for sale.

PARTIES TO THE PROCEEDING

Petitioner Cletus R. Anderson was the petitioner-appellant in the Court of Appeals.

Barry J. Nidorf, Chief Probation Officer and the Attorney General of the State of California were respondents-appellees.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THE NINTH CIRCUIT'S HOLDING THAT CALIFORNIA PENAL CODE SECTION 653W DOES NOT VIOLATE THE FIRST AMENDMENT IS CONSISTENT WITH *TALLEY* AND ITS PROGENY 5

II. NOTWITHSTANDING PETITIONER'S LACK OF STANDING, THE NINTH CIRCUIT'S HOLDING THAT CALIFORNIA PENAL CODE SECTION 653W IS NOT UNCONSTITUTIONALLY OVERBROAD IS CONSISTENT WITH

Table of Contents, cont'd.

THIS COURT'S REQUIREMENT THAT LEGISLATION BE SUBSTANTIALLY OVERBROAD IN RELATION TO ITS LEGITIMATE SWEEP IN ORDER TO RENDER IT UNCONSTITUTIONAL 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Bates v. State Bar of Arizona,
433 U.S. 350,
97 S. Ct. 2691,
53 L. Ed. 2d 810 (1977) 8

Board of Trustees of
State Univ. of N.Y. v. Fox,
492 U.S. 469,
109 S. Ct. 3028,
106 L. Ed. 2d 388 (1989) 8

Broadrick v. Oklahoma,
413 U.S. 601,
93 S. Ct. 2908,
37 L. Ed. 2d 830 (1973) 8, 9

Buckley v. Valeo,
424 U.S. 1,
96 S. Ct. 612,
46 L. Ed. 2d 659 (1976) 5

Table of Authorities, cont'd.

Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,
455 U.S. 489,
102 S. Ct. 1182,
71 L. Ed. 2d 362 (1982) 8

Magill v. Lynch,
560 F.2d 22 (1st Cir. 1977) 10

New York v. Ferber,
458 U.S. 747,
102 S. Ct. 3348,
73 L. Ed. 2d 1113 (1982) 7

Spartacus, etc. v. Board of Trustees of Illinois,
502 F.Supp. 789 (N.D. Ill. 1980) 6

Talley v. California,
362 U.S. 60,
80 S. Ct. 536,
4 L. Ed. 2d 560 (1960) 5

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626,
105 S. Ct. 2265,
85 L. Ed. 2d 652 (1985) 7

Table of Authorities, cont'd.

Statutes

Cal. Penal Code § 653w 6

STATEMENT OF THE CASE

On May 20, 1990, Los Angeles County Deputy Sheriff William Higgins, while at the Lancaster California Flea Market, observed petitioner and another man selling audio tapes at a display booth. Deputy Higgins, posing as a customer, approached the booth and saw several thousand tapes displayed for sale and a type of stereo system for the purpose of demonstrating them. The deputy examined the tapes, which appeared to be "pirated," and returned to the police station. There, he telephoned Kenneth Munson, a security consultant retained by the Recording Industry Association of America. Deputy Higgins described what he had seen at the flea market and Mr. Munson opined the tapes were counterfeit. Deputy Higgins returned to the flea market and observed petitioner loading the tapes into a van. Deputy Higgins asked petitioner whether petitioner had any documentation demonstrating the origin or manufacturer of the tapes he was selling. Petitioner replied he did not. Deputy Higgins then seized 4,940 audio tapes that petitioner and his partner were selling. Petitioner was arrested.

Following a trial by the court, petitioner was found guilty of failure to disclose the origin of a sound

recording, in violation of California Penal Code section 653w.[1/] Petitioner was granted probation on the condition he serve 180 days in the county jail.

Petitioner appealed his conviction to the California Court of Appeal, challenging the statute, inter alia, on First Amendment and overbreadth grounds. The conviction was affirmed and, thereafter, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. The petition was dismissed by A. Wallace Tashima, United States District Judge. Petitioner appealed the ruling to the Ninth Circuit Court of Appeals. In a published opinion, a unanimous three-judge panel affirmed petitioner's conviction. Petitioner's petition for rehearing was denied and the suggestion for rehearing en banc was

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1. California Penal Code section 653w, in pertinent part, provides:

> (a) A person is guilty of failure to disclose the origin of a recording or audiovisual work, when, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any recording or audiovisual work, the outside cover box or jacket of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group. This section does not require the original manufacturer or authorized licensee of software producers to disclose the contributing authors or programmers . . . .

Cal. Penal Code § 653w (West 1994).

rejected. The full court was advised of the suggestion for rehearing en banc but no judge requested a vote on the suggestion for rehearing en banc.

Petitioner seeks certiorari based on his allegation the state statute under which he was convicted violates the First Amendment and is unconstitutionally overbroad.

REASONS FOR DENYING THE WRIT

The statute in the instant case is unlike the ordinance in *Talley v. California*, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 560 (1960). Aspiring to protect anonymous political discourse, this Court in *Talley*, found a statute which banned all anonymous handbills violated the First Amendment. *Id.* at 60-66, 80 S. Ct. at 536-539, 4 L. Ed. 2d at 560-563. Although the ordinance in *Talley* was purportedly to prevent false advertising and libel, this Court was not referred to legislative history demonstrating that objective. *Id.* at 64, 80 S. Ct. at 538, 4 L. Ed. 2d at 562-563. In the instant case, undisputed by petitioner, the Ninth Circuit recognized legislative history demonstrating California Penal Code section 653w was enacted both to protect consumers and to prevent tape and record piracy. The Ninth Circuit's analysis is consistent with *Talley* and its progeny.

Similarly, petitioner can avail himself of nothing by challenging the state statute as unconstitutionally overbroad because he lacks standing to make such a challenge. The overbreadth exception to the usual rules of standing does not apply to commercial speech. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481, 109 S. Ct. 3028, 3035-3036, 106 L. Ed. 2d 388, 404-405 (1989); *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497, 102 S. Ct. 1182, 1192-1193, 71 L. Ed. 2d 362, 370-371 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381, 97 S. Ct. 2691, 2708-2711, 53 L. Ed. 2d 810, 833-834 (1977). The plain language of the statute limits its application to transactions for "commercial advantage or private gain" where goods ultimately are offered for sale or sold. The statute regulates only the labeling or identification of the goods -- clearly, commercial speech. Notwithstanding the fact the Ninth Circuit did not reach the issue of standing, respondent submits, as it did in its Appellee's Brief, that petitioner does not have standing to make this claim.

Assuming, without conceding, petitioner has standing to challenge the state statute as overbroad his claim remains unavailing. Overbreadth must be "substantial" before a statute will be invalidated on its face. *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113, 1130 (1982). The Ninth Circuit's holding that California Penal Code section 653w is not substantially overbroad is consistent with parameters set by this Court. The labeling requirement does not chill First Amendment expression or, in any way, inhibit the

commercial sale of recordings by legitimate retailers. Moreover, the statute only requires labeling on those works distributed for profit. The statute is not unconstitutionally overbroad.

I.

THE NINTH CIRCUIT'S HOLDING THAT CALIFORNIA PENAL CODE SECTION 653W DOES NOT VIOLATE THE FIRST AMENDMENT IS CONSISTENT WITH *TALLEY* AND ITS PROGENY

In *Talley v. California*, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 560 (1960), this Court addressed the First Amendment implications of an ordinance which barred distribution of any handbill in any place under any circumstance, unless the handbill contained the names and addresses of the persons who prepared, distributed, or sponsored them. The ordinance in *Talley* was held "void on its face." *Id.* at 65, 80 S. Ct. at 539, 4 L. Ed. 2d at 563. However, this Court was careful to emphasize that it was not adopting a blanket rule prohibiting disclosure of a speaker's identity. Indeed, the Court specifically reserved the question of whether identification statutes designed to prevent "fraud, false advertising and libel . . . or any other supposed evils" would be constitutional. *Id.* at 64, 80 S. Ct. at 538, 4 L. Ed. 2d at 562-563. As the Court observed, the evil of the ordinance in *Talley* was that it was "in no manner so limited, nor [was the Court] . . . referred to any legislative history indicating such purpose." *Id.* This Court later confirmed the inherent limits on the reach of *Talley* in *Buckley v.*

Valeo, 424 U.S. 1, 80-81, 96 S. Ct. 612, 663-664, 46 L. Ed. 2d 659, 722-723 (1976) where it upheld the compelled disclosure of the names of campaign distributors.

In *Spartacus, etc. v. Board of Trustees of Illinois*, 502 F.Supp. 789 (N.D. Ill. 1980), a federal district court specifically noted that in *Talley* "[t]he majority specifically reserved the question of whether identification requirements limited to prevent fraud, false advertising, libel 'or any other supposed evils' [citation] would be constitutional" and upheld an identification requirement because the subject regulation was adopted in response to a problem of fraud. *Id.* at 803-804 [upholding college regulation requiring compelled disclosure of identities of persons distributing handbills on campus].

The statute in the instant case is distinguishable from the ordinance in *Talley* and, in fact, is aimed at protecting consumers from fraud and serving the state's anti-piracy interest. Petitioner does not dispute the legislative history indicating the statute was designed to further these interests.

Moreover, petitioner does not dispute the Ninth Circuit's finding that California Penal Code section 653w makes an exception for distribution of anonymous materials as well as sales undertaken to cover the cost of production. Accordingly, petitioner's concern that section 653w *eliminates* anonymous speech in audio or visual works is unfounded. The state has lawfully regulated the

labeling required on these productions sold or possessed for sale -- a proper regulation of commercial speech.[2/]

II.

NOTWITHSTANDING PETITIONER'S LACK OF STANDING, THE NINTH CIRCUIT'S HOLDING THAT CALIFORNIA PENAL CODE SECTION 653W IS NOT UNCONSTITUTIONALLY OVERBROAD IS CONSISTENT WITH THIS COURT'S REQUIREMENT THAT LEGISLATION BE SUBSTANTIALLY OVERBROAD IN RELATION TO ITS LEGITIMATE SWEEP IN ORDER TO RENDER IT UNCONSTITUTIONAL

The traditional rule is that a party to whom a statute may be constitutionally applied cannot challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. *New York v. Ferber*, 458 U.S. 747, 757, 102 S. Ct. 3348, 3354-3355, 73 L. Ed. 2d 1113, 1122-1123 (1982). The First Amendment overbreadth doctrine espoused by petitioner is a very limited exception to this principle.

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2. Respondent acknowledges the Ninth Circuit declined to reach the parties' arguments on whether the speech regulated was commercial or noncommercial speech. (Pet. App. A at 11, n.7.) As discussed above, respondent submits California has a compelling interest in protecting the public from being victimized by false and deceptive commercial practices. However, respondent submits the speech regulated is commercial speech and, therefore, California need only demonstrate a reasonable relationship between the statute and the state's interest in preventing deception of consumers. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S. Ct. 2265, 2281-2282, 85 L. Ed. 2d 652, 672-673 (1985).

See Broadrick v. Oklahoma, 413 U.S. 601, 612-613, 839-840, 93 S. Ct. 2908, 2915-2916, 37 L. Ed. 2d 830 (1973). However, the overbreadth doctrine is "strong medicine," employed "only as a last resort." *Id.* at 613, 93 S. Ct. at 2916, 37 L. Ed. 2d at 840.

The overbreadth exception to the usual rules of standing does not apply to commercial speech. *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481, 109 S. Ct. 3028, 3035-3036, 106 L. Ed. 2d 388, 404-405 (1989); *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497, 102 S. Ct. 1182, 1192-1193, 71 L. Ed. 2d 362, 370-371 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381, 97 S. Ct. 2691, 2708-2711, 53 L. Ed. 2d 810, 833-834 (1977). A statute whose overbreadth consists of unlawful restriction of commercial speech cannot be facially invalidated on that ground. *Id.*

As discussed in footnote 2, *supra*, the Ninth Circuit did not address the issue of commercial versus noncommercial speech. Of course, the proper identification of the labeling requirement as commercial speech is fatal to petitioner's overbreadth claim due to his lack of standing.

Assuming, without conceding, petitioner has standing to assert this claim, the Ninth Circuit properly rejected it on its merits. Petitioner's claim the Ninth Circuit should have subjected his overbreadth argument to a *Talley* analysis (Pet. at 12-13) is unavailing as *Talley* dealt with facial invalidity rather than overbreadth.

Petitioner does not quarrel with the Ninth Circuit's distinction between a facial challenge and an overbreadth challenge. Specifically, the Ninth Circuit wrote:

> In claiming that a statute is unconstitutional on its face, the litigant asserts his own rights but also seeks to demonstrate that the statute is so suppressive of speech that it could never be validly applied. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-798 (1984). In an overbreadth challenge, the litigant contends that, even though a more narrowly drawn statute could validly prohibit his or her own conduct, the statute in issue is invalid because it so broadly written that it infringes unacceptably on the [F]irst [A]mendment rights of third parties. *Id.* at 789-799.

(Pet. App. A at 7-8.)

Broadrick v. Oklahoma, 413 U.S. at 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830, set forth the proper test for the Ninth Circuit as it addressed an overbreadth argument. In *Broadrick*, this Court held, in order for legislation to be unconstitutionally overbroad, the overbreadth must not only be "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." As discussed above, California has a legitimate interest in protecting consumers from fraud and deterring piracy of audio and visual works. Petitioner does not dispute this interest but claims the statute is overbroad because it does not target

unauthorized reproduction but rather applies to "all sound recordings under all circumstances." (Pet. at 9.) However, petitioner has not established the overbreadth of the statute was substantial in light of its legitimate sweep.

The requirement of labeling identifies those responsible for pirating and protects consumers from fraud. The requirement of identification of the origin of the work assists in identifying the illegal manufacturer or, at least, deter the illegal duplication of the product. Moreover, when a consumer purchases a defective product he or she (or the distributor) is able to address the manufacturer by simply referring to the label.

Petitioner's hypothetical concerning a manufacturer approached by Salman Rushdie to create a video based on the book, *The Satanic Verses* (Pet. at 12-13) does not establish substantial overbreadth. Any alleged controversy in the work has no relationship to the speech of the manufacturer. It is the commercial speech of the manufacturers that the state seeks to regulate, not the speech of the artists themselves. The First Circuit has noted in the context of overbreadth that "some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is probable." *Magill v. Lynch*, 560 F.2d 22, 30 (1st Cir. 1977). Petitioner asks this Court to draw the far-fetched conclusion that lawful purveyors and creators of legitimate music and other recorded material would be inhibited in their expression if they were required to accurately label

their recordings. Once this unlikely piece of speculation is removed from petitioner's overbreadth analysis, little is left to support a showing of substantial overbreadth. Those few examples, that may exist, where a creator or distributor of recordings may need the protection of the First Amendment, can be comfortably handled by an as-applied First Amendment defense, if such a prosecution actually takes place.

Thus, assuming without conceding, the overbreadth doctrine applies in the case at bar, it is inapposite because the statute is not substantially overbroad and does not impinge upon any First Amendment rights.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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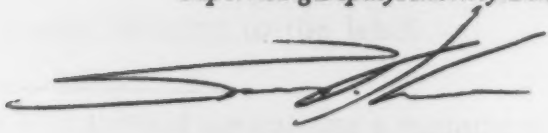

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DATED: March 3, 1995.